Syahin Hafiy Danial bin Soh Ahmad Luptepi Amin v Mansur bin Yunus & Anor

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12B-113–07 OF 2018
WONG KIAN KHEONG J
20 AUGUST 2019

Tort — Negligence — Road accident — Appeal against damages award and liability — Sessions court judge found appellant 100% liable and dismissed third party proceedings — Whether appeal could be heard against third party — Whether appellant could rely on other cases with no written judgments — Whether court should intervene regarding appellant's liability — Whether sessions court judge erred in dismissing third party proceeding — Whether the court should intervene regarding damages award — Whether sessions court judge erred in ordering judgment sum to be paid into client account of first respondent's solicitors

This was an appeal against the entire sessions' court judgment. On 10 July 2015, a collision occurred between two motorcycles ('the accident'). The second respondent ('TP') rode the first motorcycle while the first respondent ('plaintiff') was the pillion passenger and the appellant ('defendant') rode the second motorcycle. The plaintiff suffered personal injuries as a result of the accident and filed a negligence suit in the sessions court against the defendant only ('the original action'). The defendant obtained leave of the sessions court to commence third party proceedings against the TP ('the TP proceedings'). The original action and TP proceedings were heard together and after a trial, the learned sessions court judge ('SCJ') decided: (a) in the original action that: (i) the defendant was 100% liable for the tort of negligence to the plaintiff; (ii) the defendant shall pay to the plaintiff damages; and (iii) the judgment sum shall be paid into the client account of the plaintiff's solicitors; and (b) the TP proceedings was dismissed. Hence, this appeal by the defendant.

Held, allowing the appeal in part:

(1) The defendant had properly served the notice of appeal, draft index and record of appeal on the TP's last known address in accordance with O 55 rr 3(4), 4(4) and (8) read with O 62 r 6(1)(a) of the Rules of Court 2012. Accordingly, the defendant could proceed with this appeal against the TP. The TP did not appear in this appeal at his own peril (see para 12).

(2) The court was unable to accept the reference by the defendant to sealed judgments and orders as well as draft judgments and orders of the Court

of Appeal, High Court and sessions court of other cases ('the other cases') except if written judgments had been delivered in the other cases. From the view point of the stare decisis doctrine, only the ratio decidendi ascertained from a written judgment of a superior court, had binding or persuasive effect. No reliance could be placed on a digest, summary or extract of a previous decision because the court could not extract the ratio decidendi of the previous case (see paras 14–15).

(3) The sessions court had committed an error of law by admitting the TP's communication with solicitor as evidence because it was not admissible as evidence under s 126(1) of the Evidence Act 1950. Therefore, the defendant could not rely on the TP's communication with solicitor to support this appeal. The sessions court factual finding was a plain error of fact. The fact that the TP had no valid license to ride a motorcycle at the time of the accident was relevant under s 7 of the Evidence Act 1950 and should have been considered by the learned SCJ. The learned SCJ should have held both the defendant and the TP to be equally liable in negligence for causing the accident. Although the defendant and the TP were each equally negligent in causing the accident, the plaintiff as an innocent passenger who had been injured at the accident had the right to claim for 100% liability in negligence from the defendant only (without claiming anything from the TP). The legal position as laid down in *Muhamad Jafri bin Jantan & Ors v Zainal bin Md Rais* [2005] 2 MLJ 318 had not been changed by s 96(1) of the Road Transport Act 1987 as it concerned liability of insurers to satisfy judgments obtained against insured persons in respect of third party risks (see paras 17, 21, 25 & 27–28).

(4) Both of the defendant and the TP were equally negligent in causing the accident. Accordingly, the learned SCJ had committed a plain error of fact in dismissing the TP proceedings. As between the defendant and the TP, the former was entitled to a contribution of 50% of the defendant's liability by the TP. The error had occasioned an injustice to the defendant which warranted appellate intervention (see para 29).

(5) The court was unable to set aside or reduce the damages award. There was no error of law committed by the learned SCJ in making the damages award. The damages award was not 'so extremely high' as to justify appellate intervention. The damages award was 'fair and reasonable' (see para 30).

(6) The judgment sum should not have been paid into the client account of the plaintiff's solicitors. Hence, the learned SCJ had committed an error of law (see para 32).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap seluruh keputusan mahkamah sesyen. Pada 10 Julai 2015, satu perlanggaran berlaku di antara dua motosikal ('kemalangan'). Responden kedua ('pihak ketiga') menunggang motosikal pertama sementara responden pertama ('plaintif') adalah pembonceng dan perayu ('defendan') menunggang motosikal kedua. Plaintif mengalami kecederaan diri akibat kemalangan itu dan mengemukakan tuntutan kecuaian di mahkamah sesyen terhadap defendan sahaja ('tindakan asal'). Defendan mendapat kebenaran mahkamah sesyen untuk memulakan prosiding pihak ketiga terhadap pihak ketiga ('prosiding pihak ketiga'). Tindakan asal dan prosiding TP didengar bersama dan setelah perbicaraan, hakim mahkamah sesyen yang bijaksana ('SCJ') memutuskan: (a) dalam tindakan asal bahawa: (i) defendan 100% bertanggungjawab atas tindakan kecuaian terhadap plaintif; (ii) defendan harus membayar ganti rugi kepada plaintif; dan (iii) jumlah penghakiman akan dibayar ke dalam akaun klien peguam plaintif; dan (b) prosiding TP ditolak. Oleh itu, rayuan ini oleh defendan.

Diputuskan, membenarkan sebahagian rayuan:

(1) Defendan telah menyerahkan notis rayuan, draf indeks dan rekod rayuan dengan betul di alamat pihak ketiga yang terakhir diketahui sesuai dengan A 55 k 3(4), 4(4) dan (8) dibaca bersama A 62 k 6(1)(a) Kaedah-Kaedah Mahkamah 2012. Oleh itu, defendan dapat memfailkan rayuan ini terhadap pihak ketiga. Pihak ketiga tidak hadir dalam rayuan ini dengan risiko sendiri (lihat perenggan 12).

(2) Mahkamah tidak dapat menerima rujukan oleh defendan terhadap penghakiman dan perintah yang dimeteraikan serta draf penghakiman dan perintah Mahkamah Rayuan, Mahkamah Tinggi dan mahkamah sesyen kes-kes lain ('kes-kes lain') kecuali jika penghakiman bertulis telah diberikan dalam kes lain. Daripada sudut pandangan doktrin stare decisis, hanya ratio decidendi yang dipastikan daripada penghakiman bertulis dari mahkamah atasan, yang mempunyai kesan mengikat atau persuasif. Tiada kebergantungan dapat diletakkan pada ringkasan, kesimpulan atau ekstrak keputusan sebelumnya kerana mahkamah tidak dapat mengambil ratio decidendi dari kes sebelumnya (lihat perenggan 14–15).

(3) Mahkamah sesyen telah melakukan kesalahan undang-undang dengan menerima komunikasi pihak ketiga dengan peguam sebagai keterangan kerana ia tidak boleh diterima sebagai keterangan di bawah s 126(1) Akta Keterangan 1950. Oleh itu, defendan tidak dapat bergantung pada komunikasi pihak ketiga dengan peguam untuk menyokong rayuan ini. Penemuan fakta mahkamah sesyen adalah kesalahan fakta yang nyata. Fakta bahawa pihak ketiga tidak mempunyai lesen yang sah untuk menunggang motosikal pada waktu kemalangan

adalah relevan di bawah s 7 Akta Keterangan 1950 dan seharusnya dipertimbangkan oleh SCJ yang bijaksana. SCJ yang bijaksana seharusnya memutuskan kedua-dua defendan dan pihak ketiga sama-sama bertanggungjawab dalam kecuaian kerana menyebabkan kemalangan. Walaupun defendan dan pihak ketiga masing-masing sama-sama cuai dalam menyebabkan kemalangan itu, plaintif sebagai penumpang yang tidak bersalah yang cedera dalam kemalangan itu berhak untuk menuntut 100% tanggungjawab atas kecuaian dari defendan sahaja (tanpa menuntut apa-apa daripada pihak ketiga). Kedudukan undang-undang seperti yang dinyatakan dalam *Muhamad Jafri bin Jantan & Ors v Zainal bin Md Rais* [2005] 2 MLJ 318 tidak diubah oleh s 96(1) Akta Pengangkutan Jalan 1987 kerana ia berkenaan dengan tanggungjawab syarikat insurans untuk memenuhi keputusan yang diperoleh terhadap orang yang diinsuranskan berkenaan dengan risiko pihak ketiga (lihat perenggan 17, 21, 25 & 27–28).

(4) Kedua-dua defendan dan pihak ketiga sama-sama cuai dalam menyebabkan kemalangan. Oleh itu, SCJ yang bijaksana telah melakukan kesalahan fakta yang nyata dalam menolak prosiding pihak ketiga. Berkenaan defendan dan pihak ketiga, defendan berhak mendapat sumbangan 50% daripada liabiliti defendan oleh pihak ketiga. Kesalahan tersebut menyebabkan ketidakadilan terhadap defendan yang memerlukan campur tangan rayuan (lihat perenggan 29).

(5) Mahkamah tidak dapat mengetepikan atau mengurangkan ganti rugi. Tidak ada kesalahan undang-undang yang dilakukan oleh SCJ yang bijaksana dalam membuat award ganti rugi. Award ganti rugi itu tidak 'terlalu tinggi' untuk membenarkan campur tangan rayuan. Award ganti rugi itu adalah 'adil dan munasabah' (lihat perenggan 30).

(6) Jumlah penghakiman tidak seharusnya dimasukkan ke dalam akaun klien peguam plaintif. Oleh itu, SCJ yang bijaksana telah melakukan kesalahan undang-undang (lihat perenggan 32).]

Cases referred to

Abdul Wahab bin Jam Jam v Abdul Wahab bin Abdullah & Anor [2008] 7 MLJ 277; [2008] 7 CLJ 741, HC (refd)

Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29, FC (refd)

Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation [1986] 2 MLJ 124, SC (refd)

Mohamed bin Abdullah v Chah Hea Seng [1980] 2 MLJ 282, FC (folld)

A *Muhamad Jafri bin Jantan & Ors v Zainal bin Md Rais* [2005] 2 MLJ 318, CA (folld)
Ng Aik Kian & Anor v Sia Loh Sia [1997] MLJU 143; [1997] 2 CLJ Supp 218, HC (refd)
Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30, FC (refd)
B *Poon Weng San & Anor v Chandran a/l Narunan & Anor* [2019] MLJU 1358; [2019] 1 LNS 621, HC (refd)
Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401, SC (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
Toralf Mueller v Alcim Holding Sdn Bhd & Ors [2015] MLJU 779, HC (refd)
C *United Plywood & Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237, FC (folld)

Legislation referred to

Evidence Act 1950 ss 3, 7, 126(1)(a), s126(1)(b), 167
D Road Transport Act 1987 s 96(1)
Rules of Court 2012 O 10 r 1(1), O 55 rr 3(4), 4(4), (8), O 62 rr 3, 6(1)(a)

Vinod a/l R Kamalanathan (Vinod Kamalanathan & Assoc) for the appellant.
Harjinder Singh (Mani Maran a/l Chellappan and Khairul Aiman bin Kamar Rozaman with him) (G Dorai & Co) for the first respondent.
E *Second respondent not present.*

Wong Kian Kheong J:

F A. BACKGROUND

[1] I will refer to parties as they are in the sessions court ('SC').

[2] At about 12.15am, 10 July 2015:

G (a) a collision occurred at Padang Jawa, Shah Alam ('accident') between motorcycle No BHA211 ('first motorcyle') and motorcycle No BNE5096 ('second motorcyle');

(b) the third party ('TP') (the second respondent in this appeal) rode the
H first motorcyle while the plaintiff ('plaintiff') was the pillion passenger; and

(c) the defendant ('defendant') rode the second motorcycle.

I **[3]** The plainitff suffered personal injuries as a result of the accident and filed a negligence suit in SC against the defendant only ('original action').

[4] The defendant obtained leave of SC to commence third party proceedings against the TP ('TP proceedings').

[5] The original action and TP proceedings were heard together and after a trial, the learned sessions court judge ('SCJ') decided as follows, among others ('SC judgment'): A

(a) in the original action:

(i) the defendant is 100% liable for the tort of negligence to the plainitff ('defendant's liability'); B

(ii) the defendant shall pay to the plainitff the following damages ('damages award'):

(A) general damages amounting to RM226,000; and C

(B) special damages in the sum of RM319,320.50;

(iii) the defendant shall pay interest on the damages award as specified in SC judgment;

(iv) costs amounting to RM48,419.30; D

(v) the judgment sum shall be paid into the client account of the plainitff's solicitors; and

(b) the third party proceedings is dismissed. E

[6] The defendant has appealed to this court against the entire SC judgment ('this appeal').

[7] The TP did not appear in the this appeal. F

B. ISSUES

[8] This appeal raises the following questions:

(a) whether the defendant can proceed with this appeal against the TP after leaving the following documents on the TP's last known address: G

(i) the defendant's notice of appeal ('NA');

(ii) the defendant's draft index ('draft index') of documents to be included in record of appeal ('RA'); and H

(iii) the RA.

In this regard, is the defendant required to effect personal service of the NA, draft index and RA on the TP under O 55 rr 3(4), 4(4) and (8) of the Rules of Court 2012 ('the RC')? I

(b) from the view point of the stare decisis doctrine, what is the effect of a sealed or draft judgment or order of a court in a case where the court has not delivered a written judgment?

(c) should the High Court intervene regarding the defendant's liability? To decide this question, the following issues arise:

(i) who was negligent and caused the accident? In this regard:

(A) could the defendant's learned counsel cross-examine TP on communications made between TP and TP's former solicitor? and

(B) whether the court should have considered the fact that the TP had no valid license to ride the first motorcycle at the time of the accident; and

(ii) if the defendant and TP are jointly liable in negligence to the plainitff regarding the accident, whether the plainitff, an 'innocent passenger' of TP, has the right according to Malaysian case law to claim for 100% liability in damages from only the defendant (without claiming anything from the TP) ('Malaysian case law position'). In this respect, has the Malaysian case law position been overruled by s 96(1) of the Road Transport Act 1987 ('the RTA');

(d) whether the learned SCJ has committed a plain error of fact in dismissing the TP proceedings without considering the fact that the TP is negligent in respect of the accident which entitles the defendant to a contribution from the TP as regards the defendant's liability;

(e) is there any ground for appellate intervention regarding the damages award? and

(f) whether the SC has committed an error of law in ordering the judgment sum to be paid into the client account of the plainitff's solicitors.

C. CAN THIS APPEAL BE HEARD AGAINST TP?

[9] The defendant's solicitors have filed affidavits which proved that the NA, draft index and RA have been served on TP's last known address (the address given by TP in SC when TP testified for the plainitff).

[10] I reproduce O 10 r 1(1), O 55 rr 3(4), 4(4), (8), O 62 rr 3, and 6(1)(a) of the RC below:

> O 10 r 1(1) Subject to the provisions of any written law and these Rules, *a writ shall be served personally on each defendant or sent to each defendant by prepaid AR registered post addressed to his last known address* and in so far as is practicable, the first attempt at service must be made not later than one month from the date of issue of the writ.
>
> O 55 r 3(4) *A duplicate copy of the notice of appeal must be served by the appellant within the time limited for the filing of an appeal on all respondents.*
>
> ...

O 55 r 4(4) *A draft index of the documents to be included in the record of appeal shall be sent by the solicitors for the appellant to the solicitors for the respondent* who or, if more than one, any one of whom may, within forty-eight hours, object to the inclusion or exclusion of any document.

...

O 55 r 4 (8) *The appellant shall within the time limited for the filing* of a record of appeal serve each respondent with a copy of such record of appeal.

Personal Service: How Effected

O 62 r 3 *Personal service of a document is effected by leaving a copy of the document with the person to be served and, if so requested by him at the time when it is left, showing him:*

(a) *in the case where the document is a writ or other originating process, the sealed copy; and*

(b) *in any other case, an office copy.*

Ordinary Service: How Effected

O 62 r 6(1) *The service of any document, not being a document which in accordance with these Rules is required to be served personally, may be effected:*

(a) *by leaving the document at the proper address of the person to be served;* ...

(Emphasis added.)

[11] O 10 r 1(1) of the RC requires a writ to be served personally (within the meaning of O 62 r 3 of the RC) or by prepaid 'AR registered post'. However, O 55 rr 3(4), 4(4) and (8) of the RC merely require 'ordinary service' of a NA, draft index and RA. According to O 62 r 6(1)(a) of the RC, one mode of ordinary service of a document is by 'leaving the document at the proper address of the person to be served'.

[12] I am satisfied that the defendant has properly served the NA, draft index and RA on the TP's last known address in accordance with O 55 rr 3(4), 4(4) and (8) read with O 62 r 6(1)(a) of the RC. Accordingly, the defendant can proceed with this appeal against the TP. The TP does not appear in this appeal at his own peril.

D. WHAT IS EFFECT OF JUDGMENT OR ORDER WITHOUT WRITTEN GROUNDS?

[13] In support of this appeal, the defendant's learned counsel has referred to the following:

(a) sealed judgments and orders as well as draft judgments and orders of the Court of Appeal, High Court and sessions court of other cases ('other cases');

(b) written submission filed in the other cases; and

(c) memorandum of appeal and notice of appeal filed in the other cases.

[14] I am not able to accept the reference by the defendant's learned counsel to other cases except if written judgments have been delivered in the other cases. This is because from the view point of the stare decisis doctrine, only the ratio decidendi ascertained from a written judgment of a superior court, has binding or persuasive effect. I refer to the judgment of Raja Azlan Shah FJ (as his Majesty then was) in the Federal Court case of *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 at 32 as follows:

> *However, I would once again emphasize what has so often been said before, that precedents are not to be slavishly followed; a case may be followed only for its strict ratio decidendi.* (Emphasis added.)

Without a written judgment of a previous case, the court cannot ascertain the ratio decidendi of the previous case by considering the following three matters ('three matters'):

(a) the material facts of the case which give rise to the issue to be decided by the court;

(b) the rule of law which has been applied by the court to resolve the issue; and

(c) the reasoning of the court in applying the rule of law to decide the issue in question.

[15] In *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, the appellant's learned counsel referred to a digest, summary or extract of a previous decision, Heah Chin Kim. Suffian LP held as follows in the Federal Court in *Datuk Haji Harun* at p 170:

> *The full judgment in Heah Chin Kim [1954] MLJ xxxiii is not available and it is impossible for us to determine its ratio decidendi.* (Emphasis added.)

Based on *Datuk Haji Harun*, no reliance can be placed on a digest, summary or extract of a previous decision because the court cannot extract the ratio decidendi of the previous case by considering the three matters.

E. WHETHER THE DEFENDANT COULD ADDUCE EVIDENCE REGARDING COMMUNICATION BETWEEN THE TP AND TP'S FORMER SOLICITOR?

[16] The defendant's learned counsel has contended that the TP is not a credible witness because the TP has lodged a second police report ('TP's second police report') based on the 'advice' of TP's former solicitor. During the trial of this case, the defendant's then learned counsel had questioned the TP regarding

the TP's second police report and the TP testified that the TP's second police report had been made based on the 'advice' of TP's former solicitor ('TP's communication with solicitor'). A

[17] I am of the view that the SC has committed an error of law by admitting as evidence TP's communication with solicitor ('first legal error'). The first legal error is made because TP's communication with solicitor is not admissible as evidence under s 126(1) of the Evidence Act 1950 ('the EA'). Section 126(1) of the EA provides as follows: B

> 126 *Professional communications* C
>
> (1) *No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:* D
>
> *Provided that nothing in this section shall protect from disclosure:*
>
> (a) *any such communication made in furtherance of any illegal purpose;*
>
> (b) *any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.* E
>
> (2) *It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.*
>
> *Explanation — The obligation stated in this section continues after the employment has ceased.* (Emphasis added.) F

[18] As decided in *Toralf Mueller v ALCIM Holding Sdn Bhd & Ors* [2015] MLJU 779 at [75(c)], there are only three exceptions to s 126(1) of the EA ('three exceptions') (which admits legally privileged communication), namely: G

(a) when the client has expressly consented to the disclosure of legally privileged communication;

(b) when legally privileged communication is made in furtherance of any illegal purpose — please see proviso (a) to s 126(1) of the EA; and H

(c) when an advocate and solicitor ('A&S') has observed any fact in the course of the A&S's employment which shows that a crime or fraud has been committed since the commencement of the A&S's employment — please refer to the proviso (b) to s 126(1) of the EA. I

[19] In this case, there is no scope to apply any of the three exceptions to admit as evidence TP's communication with solicitor. Hence, the first legal error.

[20] It is trite law that a party's failure to object to inadmissible evidence, does not admit the inadmissible evidence — please see the Supreme Court's judgment delivered by Lee Hun Hoe CJ (Borneo) in *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 at p 127. As such, the failure of TP to object to the admissibility of TP's communication with solicitor as evidence at the trial in SC, could not admit such evidence.

[21] In view of the first legal error, the defendant cannot rely on TP's communication with solicitor to support this appeal.

[22] Despite the first legal error, in my view, the first legal error does not affect the merits of this appeal (for reasons which are explained in parts F to I below). I rely on s 167 of the EA which provides as follows:

> 167 *No new trial for improper admission or rejection of evidence*
>
> *The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.* (Emphasis added.)

F. WHO WAS NEGLIGENT AND CAUSED THE ACCIDENT?

[23] It is not disputed that as a general rule, an appellate court shall not intervene regarding a trial court's findings of fact unless there is a plain error of fact by the trial court which has caused an injustice and warrants appellate intervention — please see the judgment of Steve Shim CJ (Sabah & Sarawak) in the Federal Court case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at pp 8–11; [2004] 4 CLJ 309 at pp 317–321.

[24] The SC found as a fact that that the defendant was 100% liable in negligence for the accident and did not find any fault on the TP's part ('SC's factual finding'). According to the learned SCJ, the fact that the TP had no valid license to ride the first motorcycle at the time of the accident (please see the evidence of the investigating officer in this case, Sergeant Rosli bin Mohd Nor) was not relevant.

[25] I accept the submission of the defendant's learned counsel that SC's factual finding is a plain error of fact ('first plain error'). The first plain error is based on the following evidence and reasons:

(1) the fact that the TP had no valid license to ride a motorcycle at the time of the accident is relevant under s 7 of the EA and should have been

considered by the learned SCJ. Section 7 of the EA provides as follows:

> 7 *Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity of their occurrence or transaction, are relevant.* (Emphasis added.)
>
> A 'fact in issue' is defined in s 3 of the EA as 'any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows'. One of the facts in issue in this case is who is negligent in respect of the accident? ('fact in issue');

(2) the TP had not undergone lessons to ride a motorcycle and had not passed a competence test (conducted by the road transport department) ('competence test') so as to entitle the TP to apply for a license to ride a motorcycle;

(3) if the TP had not had not passed a competence test, the TP did not possess sufficient competence to ride the first motorcyle at the time of the accident; and

(4) the TP's lack of competence to ride the first motorcyle at the time of the accident:

(i) was 'the occasion, cause or effect, immediate or otherwise' of the accident; and/or

(ii) constituted the 'state of things under which (the accident) happened or which afforded an opportunity' for the accident to occur.

In the High Court case of *Abdul Wahab bin Jam Jam v Abdul Wahab bin Abdullah & Anor* [2008] 7 MLJ 277; [2008] 7 CLJ 741 at [29] and [30], Mohamed Apandi Ali J (as he then was) considered a motorcyclist's lack of valid license to ride a motorcycle to support a finding of fact that the motorcyclist was 80% liable in negligence for the accident in question.

Section 7 of the EA has a wide application — please see the judgment of Chong Siew Fai CJ (Sabah and Sarawak) in the Supreme Court case of *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401 at p 411;

(5) the plainitff could not remember anything about the accident due to the injuries suffered by the plainitff in the accident. The defendant and TP gave conflicting versions of how the accident occurred. There was no independent eyewitness to the accident. In such circumstances, the learned SCJ should have held both the defendant and TP to be equally liable in negligence for causing the accident. I rely on the Federal Court's

judgment delivered by Wan Suleiman FJ in *Mohamed bin Abdullah v Chah Hea Seng* [1980] 2 MLJ 282 at p 283, as follows:

> *We are of the view that the principles enunciated in Baker v Market Harborough Industrial Cooperative Society Ltd [1953] 1 WRL 1472, followed by our Court of Appeal in Ong Yam Chong & Anor v Chan Wah [1962] MLJ 184, that where there is a collision between two vehicles travelling in opposite directions then in the absence of special circumstances there is a prima facie presumption that both drivers are negligent and the onus falls on each of them to show that the other driver rather than himself was negligent, is applicable in this instance.* (Emphasis added.)

Mohamed bin Abdullah has been followed by Abdul Malik Ishak J (as he then was) in the High Court in *Ng Aik Kian & Anor v Sia Loh Sia* [1997] MLJU 143; [1997] 2 CLJ Supp 218 at 228; and

(6) the accident occurred at about 12.15am, Friday, 10 July 2015. At such an unearthly hour on an ordinary working day (not a public holiday or weekly holiday), it is probable that both the defendant and TP are equally negligent in riding their motorcycles and this has caused the accident.

[26] Based on the reasons explained in the above sub-paras 25(2) and (3), as between the defendant and TP, both of them are equally negligent in causing the accident.

G. WHETHER THE PLAINTIFF CAN CLAIM 100% LIABILITY IN DAMAGES FROM THE DEFENDANT ONLY

[27] I am of the view that although the defendant and TP are each equally negligent in causing the accident, the plainitff as an innocent passenger who has been injured at the accident has the right to claim for 100% liability in negligence from the defendant only (without claiming anything from the TP). This view is premised on the following Court of Appeal's judgment delivered by Arifin Zakaria JCA (as he then was) in *Muhamad Jafri bin Jantan & Ors v Zainal bin Md Rais* [2005] 2 MLJ 318 at [9]–[11]:

> [9] *Reverting to the primary issue in this appeal, which is whether the appellant, as the pillion rider, is entitled to damages on 100% basis even though the court found that the rider of the motorcycle was 50% liable for the accident, we only need to refer to some of the authorities cited to us by the parties. Firstly, we would refer to the case of Damai Cheras Sdn Bhd & Anor v Poothapillai Krishnamoorthy [1998] 1 MLJ 639. In that case, the respondent (the plainitff) was the registered owner of and a passenger in a car which was involved in a collision with the first defendant's car, driven by the second defendant. The plainitff was traveling with his son (SP2) who was authorised by the plainitff to drive the car. The plainitff brought an action against the defendants. The SCJ held that the defendants were 10% liable for the accident and since the plainitff was an innocent passenger at all material times, the plainitff was entitled to damages on a 100%*

basis. The defendants appealed. It was submitted that the plainitff was not an innocent passenger because of the fact that the plainitff was the owner of the car and SP2 was driving the car with the authority of the plainitff. Therefore, the plainitff was vicariously liable for the negligence of SP2 who was 90% liable for the accident. The issue before the court was whether the plainitff was an innocent passenger and so was entitled to damages on a 100% basis.

[10] *In that case it was held, inter alia, that once a person has proved that he is an innocent passenger, he is entitled to a claim based on 100% liability. It is the personal prerogative of the innocent passenger to sue the negligent party responsible for causing damage or injury to him in the accident. In coming to that finding, the learned judge relied on a long line of authorities namely — Oli Mohamed v Keith Murphy & Anor [1969] 2 MLJ 244; Wong Fook & Anor v Abdul Shukur bin Abdul Hakim (Wong Piang Loy, Third Party) [1991] 1 MLJ 46; Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and another appeal [1996] 1 MLJ 576 and Jayakumar s/o Kuppusamy & Anor v Chen Kit Hong & Anor [1984] 1 MLJ 376. All the authorities cited by the learned judge point to one conclusion, that an innocent passenger in a motor vehicle or a pillion rider is entitled to recover the total amount of damages against a tortfeasor and it is within his prerogative to recover the damages against any one of the tortfeasors. In Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and another appeal, the same issue as in the present case was raised, that is, whether a pillion rider was entitled to recover 100% damages against the respondent where the learned SCJ found that both the deceased rider of the motorcycle and the driver of the motor lorry were equally to blame. The learned High Court judge in that case, following Oli Mohamed v Keith Murphy & Anor [1969] 2 MLJ 244 and Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor [1993] MLJU 10; [1993] 4 CLJ 291, held that the pillion rider is entitled to the total amount of damages notwithstanding the finding that the deceased rider of the motorcycle and the driver of the motor lorry were equally blameworthy. We wholly agree with the decision of the learned judge in that case.*

[11] *For the above reasons, we hold that the learned JC erred in law in holding that the appellant, the pillion rider on the motorcycle, is 50% liable for the accident. Following the authorities cited, we hold that the appellant is entitled to recover the total amount of damages against the respondent.* (Emphasis added.)

[28] I am not able to accede to the submission by the defendant's learned counsel that the above legal position as laid down in *Muhamad Jafri* has been changed by s 96(1) of the RTA. Section 96(1) of the RTA provides as follows:

96 *Duty of insurers to satisfy judgments against persons insured in respect of third party risks*

(1) *If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.* (Emphasis added.)

A It is clear that a literal reading of s 96(1) of the RTA does not evince any intention by Parliament to overrule the legal position as expounded in *Muhamad Jafri*. This is because s 96(1) of the RTA concerns liability of insurers to satisfy judgments obtained against insured persons in respect of third party risks. Section 96(1) of the RTA does not provide that if two or more tortfeasors B are jointly liable in negligence to an innocent passenger, the innocent passenger cannot claim for 100% liability in damages from only one joint tortfeasor. It is to be noted that based on the stare decisis doctrine, the Court of Appeal's decision in *Muhamad Jafri* is binding on me.

C H. DID SC COMMIT PLAIN ERROR OF FACT IN DISMISSING TP PROCEEDINGS?

[29] For reasons stated in the sub-paras 25(2) and (3), as between the defendant and TP, both of them are equally negligent in causing the accident. D Accordingly, the learned SCJ has committed a plain error of fact in dismissing the TP proceedings ('second plain error'). As between the defendant and TP, the former is entitled to a contribution of 50% of the defendant's liability by the TP. The second plain error has occasioned an injustice to the defendant which warrants appellate intervention.

E

I. SHOULD HIGH COURT INTERVENE REGARDING DAMAGES AWARD?

[30] This court is unable to set aside or reduce the damages award due to the F following reasons:

(a) the learned SCJ has given reasons for the damages award, including special damages for the plainitff's loss of income. In making the damages award, reference has been made by the SC to the relevant cases and the G Bar Council's 'Revised Compendium of Personal Injury Awards'. The damages award is also supported by reports by medical specialists concerning the injuries suffered by the plainitff as a result of the accident;

(b) I cannot detect any error of law committed by the learned SCJ in H making the damages award;

(c) the damages award is not 'so extremely high' as to justify appellate intervention — please see the judgment of Azmi CJ (Malaya) (as he then was) in the Federal Court case of *Topaiwah v Salleh* [1968] 1 MLJ 284 I at p 285;

(d) applying the test laid down by Gill FJ (as he then was) in the Federal Court in *United Plywood & Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237, at 238, I do not find the damages award to be 'so ... inordinately high as to make the court exclaim, 'Good gracious, is that the sum which

has been awarded — that sum must be altered', or if it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate'; and

(e) I am of the view that the damages award is 'fair and reasonable' — please see the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30 at p 32.

J. DOES SC HAVE POWER TO ORDER JUDGMENT SUM BE PAID INTO CLIENT ACCOUNT OF PLAINTIFF'S SOLICITORS?

[31] It is decided in *Poon Weng San & Anor v Chandran a/l Narunan & Anor* [2019] MLJU 1358; [2019] 1 LNS 621 at [24]–[29], as follows:

[24] When I inquired from learned counsel for the plainitffs and defendants on whether the court has power under the law to order a judgment sum to be paid into a solicitor's client account, they answered that there was a 'general practice' in personal injury claims for parties to consent to such a court order (alleged practice).

[25] Firstly, r 2 of the Solicitors' Account Rules 1990 ('the SAR') defines a 'client account' as follows:

> *'client account' means a current or deposit account at a bank in the name of the solicitor in the title of which the word 'client' appears.* (Emphasis added.)

It is clear from the definition of a solicitor's 'client account' in r 2 SAR that such an account is owned by the solicitor and not by the client (party in a suit).

[26] *I have perused the Courts of Judicature Act 1964, Subordinate Courts Act 1948, Legal Profession Act 1976, SAR and RC. I cannot find any written law which confers power on a court to order a judgment sum (damages and costs) to be paid to a person who is not a party in the suit (Stranger). Nor can I find any previous case which has decided that the court has the power to order a judgment sum be paid to a Stranger. My research has also not revealed any power for the court to order a judgment sum to be deposited into a solicitor's client account.*

[27] *I am of the view the alleged practice cannot confer any power on a court to order a judgment sum to be paid into a solicitor's client account.*

[28] Rule 27(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ('the LPR') provides as follows:

> *r 27 Advocate and solicitor not to appear where pecuniarily interested*
>
> *(a) An advocate and solicitor shall not appear in any matter in which he is directly pecuniarily interested.* (Emphasis added.)

If the court orders a judgment sum to be paid into a solicitor's client account, this may 'facilitate' a breach of r 27(a) LPR (Breach) by advocates and solicitors (A&S).

[29] *Lastly, if the court has no power under the law to order a judgment sum to be paid to a Stranger, I am of the view that parties in an action cannot consent to such a payment. Consequently, parties in a suit cannot consent to a court order for a judgment sum to be*

deposited into a solicitor's client account. This is understandable because parties cannot consent to or abet in the Breach by A&S. (Emphasis added.)

[32] Based on the reasons explained in *Poon Weng San*, the judgment sum should not have been paid into the client account of the plainitff's solicitors. Hence, the learned SCJ has committed an error of law in this respect.

K. DECISION

[33] In summary:

(a) the defendant could proceed with this appeal against the TP because the defendant had properly served the NA, draft index and RA on the TP's last known address in accordance with O 55 rr 3(4), 4(4) and (8) read with O 62 r 6(1)(a) of the RC;

(b) as a matter of stare decisis, the defendant's learned counsel cannot rely on the other cases which do not have written judgments because the court cannot identify the ratio decidendi of the other cases due to a lack of the three matters;

(c) the defendant is barred by s 126(1) of the EA from adducing as evidence the TP's communication with solicitor;

(d) the learned SCJ should have found as a fact that the defendant and TP are equally negligent in causing the accident;

(e) as decided by the Court of Appeal in *Muhamad Jafri*, even though the defendant and TP are equally negligent in causing the accident, the plainitff as an innocent passenger has the right to claim for 100% liability in negligence from the defendant only (without claiming anything from the TP). This legal position has not been altered by s 96(1) of the RTA;

(f) as between the defendant and TP, the SC should have decided that the defendant is entitled to a contribution of 50% of the defendant's liability by the TP;

(g) there is no ground for this court to intervene regarding the damages award; and

(h) the SC has no power to order the judgment sum to be paid into the client account of the plainitff's solicitors.

[34] This appeal is partially allowed with the following order:

(a) the defendant's appeal in respect of the original action is dismissed with costs of this appeal to be paid by the defendant to the plainitff;

(b) the TP shall contribute 50% of the defendant's liability and the TP shall pay costs of this appeal to the defendant; and

(c) part of the SC judgment (which ordered the judgment sum to be paid into the client account of the plainitff's solicitors) is set aside.

Appeal allowed in part.

Reported by Ahmad Ismail Illman Mohd Razali